



**DISCRIMINATION LAW:
EQUALITY IN THE PRIVATE SECTOR**

2004-2005

Volume 1

Professor Denise Réaume

Faculty of Law
University of Toronto

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546-47 (*per McIntyre*)), *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114

(6) Differences in wording between the provisions of human rights legislation in different provinces should not be interpreted so as to obscure the essentially similar purposes of the provisions, unless clearly different legislative purposes are stated or implied: *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, 18 C.H.R.R. D/310 at D/322, para. 32; *Gould v. Yukon Order of Pioneers* (1996), 25 C.H.R.R. D/87 (S.C.C.).

(7) A human rights code is remedial legislation and is to be given such interpretation as will best insure that its objects are attained (*Canadian National Railway v. Canada, supra, Ontario (Human Rights Commission) v. Ontario (Ministry of Health)* (1994), 21 C.H.R.R. D/259 (Ont. C.A.)) One of the general objects of human rights legislation "is to secure, as far as is reasonably possible, equality, that is to say fairness . . .": *Chambly (Commission scolaire régionale c. Bergevin*, [1994] S.C.J. No. 57 at 16 (*per Cory J.*)).

(8) A human rights code should be interpreted so as to guarantee to all members of society that they will be assessed as individuals on the basis of their own merits rather than on the basis of belonging to a group identified by a personal characteristic mentioned in the code. *Brossard (Town) v. Quebec*, [1988] 2 S.C.R. 279 at 297-98, [10 C.H.R.R. D/5515 at D/5525-5526] (*per Beetz J.*) and 344 [D/5559] (*per Wilson J.*), *Air Canada v. Carson*, [1985] 1 F.C. 209 at 239 16 C.H.R.R. D/2848 and D/28521 (C.A.), *Cashin v. CBC.*, [1988] 3 E.C. 494 and 506 (9 C.H.R.R. D/5343 and D/5349) (C.A.).

(9) Jurisprudence pertaining to the interpretation of the *Charter of Rights and Freedoms*, particularly s. 15, may be relied upon in interpreting human rights code guarantees: see *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *Ontario (Human Rights Commission) v. Ontario (Ministry of Health)*, *supra*.

...

NOTE: It is often remarked upon that Human Rights Codes are quasi-constitutional statutes, and therefore should be given a large and liberal interpretation. For example, in *C.N. v. Canada (Canadian Human Rights Commission)*, (*Action Travail des Femmes*), [1987] 1 S.C.R. 1114, the Supreme Court summarized this interpretive stance as follows:

INTERPRETING HUMAN RIGHTS LEGISLATION ...

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. See s. 11 of the *Interpretation Act*, ..., as amended. As E. A. Driedger, *Construction of Statutes*, p. 87 has written:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of

the Act, the object of the Act, and the intention of Parliament.

The purposes of the Act would appear to be patently obvious, in light of the powerful language of s. 2. In order to promote the goal of equal opportunity for each individual to achieve “the life that he or she is able and wishes to have”, the Act seeks to prevent all “discriminatory practices” based, *inter alia*, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination. ...

The first comprehensive judicial statement of the correct attitude towards the interpretation of human rights legislation can be found in *Heerspink*, ..., where Lamer J. emphasized that a human rights code “is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law”. This principle of interpretation was further articulated by McIntyre J., for a unanimous Court, in *Winnipeg School Division No. 1 v. Craton*, ...:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

The emphasis upon the “special nature” of human rights enactments was a strong indication of the Court’s general attitude to the interpretation of such legislation.

In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, ..., the Court set out explicitly the governing principles in the interpretation of human rights statutes. Again writing for a unanimous Court, McIntyre J. held, at pp. 546-7:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment, ... and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

...

On the other hand, the Court has also repeatedly warned against taking this too far. For example, in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, Chief Justice Lamer said,

This interpretive approach does not give a board or court license to ignore the words of the *Act* in order to prevent discrimination whenever it is found. While this may be a laudable goal, the legislature has stated, through the limiting words in s. 3 [of the *British Columbia Human Rights Act*], that some relationships will not be subject to scrutiny under human rights legislation. It is the duty of boards and courts to give s. 3 a liberal and purposive construction, without reading the limiting words out of the *Act* or otherwise circumventing the intention of the legislature.

CHAPTER 3: OF PIGEONHOLES AND PRINCIPLES: THE GROUNDS AND SPHERES COVERED

NOTE:

It is useful to think of a discrimination complaint as being structured around three conceptual pillars. These are:

1. the grounds upon which an individual may not be denied a good or opportunity - or the **bases** of unlawful discrimination -,
2. the type of good, benefit, or opportunity whose pursuit is protected - or the **spheres** within which discrimination is prohibited -,
3. and the circumstances that make a denial unlawful - or the **fault** standard for discrimination.

The next chapter of the materials (Chapter 4) will begin our exploration of the last of these - the fault standard. First, we look at the rules with respect to the first two aspects of unlawful discrimination. These have developed into a quite detailed system dictating who can't do what to whom in what contexts. In this chapter we look at some examples of efforts to adjudicate the scope of the Code's protection both with respect to the grounds upon which it is prohibited, and the spheres within which discrimination is prohibited. We start with the prohibited grounds, looking at the debates over

- whether the category of disability includes discrimination against someone on the grounds of obesity,
- whether discrimination against transgendered persons is sex discrimination.
- whether family status includes relationships to particular individuals,
- whether failure to provide the same employment benefits to same sex couples as heterosexual couples enjoy is discrimination on the basis of family status,
- whether it is discrimination on the basis of sexual orientation if the discriminator does not think the 'target' of the discriminatory conduct is gay, and

We will conclude by looking at recent developments in the area of the right to equal treatment in the provision of goods, services, and facilities.

The point of this section is not to come away with all the latest law on which categories and what spheres are covered by the Code. Rather, as you read these cases, you should think about both how the scope of the legislation has been defined by the statute and how the courts have gone about interpreting those legislated parameters. What function do the categories of prohibited discrimination serve? Why do you think the legislature chose the categories it did? Could it have defined the categories differently? If you were a legislative draftsman, how would you suggest defining them? Why do you think the legislature chose the specific spheres covered?

Do the specific categories and spheres included tell us anything important about the purpose of discrimination law?

A. Introduction

Note: A significant difference between *Human Rights Codes* and s. 15 of the *Charter* is precisely that the Codes tend to precisely enumerate the prohibited grounds of discrimination whereas the *Charter* is open-ended. In the *Charter* context, Justice L'Heureux-Dubé has been a consistent critic of what she sees as too close a reliance on discerning the grounds of discrimination in s. 15 interpretation. Her critique of the 'grounds approach' is excerpted below. Justice L'Heureux-Dubé offers an approach to discerning when discrimination has occurred that focuses on two factors: the nature of the group affected, and the nature of the interest affected.

- Does her argument apply to the *Human Rights Code* context, that is, should it lead us to be critical of the way in which the *Codes* have been drafted?
- Does her analysis of the nature of the group affected by discrimination help us work out a rationale for the grounds included in the *Codes* and their limits?
- Does her analysis of the nature of the interest affected by discrimination help us provide a rationale for the spheres of activity in which discrimination is prohibited by the *Codes*?

Egan v. Canada

[1995] 2 S.C.R 513

...

I will first discuss why I believe that the current vehicle of choice for fulfilling the purposes of s. 15, the "grounds" approach, is incapable of giving full effect to this purpose. I will then elaborate upon an approach that I believe to be more capable of enabling s. 15 to realize its full potential.

(i) The Imperfect Vehicle of "Grounds"

In order to realize fully the purpose of *Charter* rights, it is necessary to look to the effects of impugned legislative actions. In the context of s. 15, no intention to discriminate need be demonstrated in order to render a particular distinction discriminatory. ... I believe the following observation, at p. 173 of *Andrews*, to be at the core of this Court's philosophy regarding the notion of discrimination:

... no intent was required as an element of discrimination, *for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint.* [Emphasis added.]

It is here, however, that the emphasis on grounds and, correspondingly, on "analogous grounds", developed in *Andrews* runs into the greatest difficulty. Rather than focus on "discrimination" directly, the "grounds" approach focuses courts' attentions on the types of grounds which may be a basis for a finding of discrimination. Because a finding that a ground is either enumerated or analogous is a necessary pre-condition for a finding of discrimination, most analysis is devoted toward characterizing the basis for the distinction.... This approach inquires

some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect. On a practical level, where both forms of discrimination are prohibited, one can ignore the complexity of the interaction, and characterize the discrimination as of one type or the other. The person is protected from discrimination in either event.

However, though multiple levels of discrimination may exist, multiple levels of protection may not. There are situations where a person suffers discrimination on more than one ground, but where only one form of discrimination is a prohibited ground. When faced with such situations, one should be cautious not to characterize the discrimination so as to deprive the person of any protection. This was the situation in *Bliss v Attorney General of Canada*, [1979] 1 S.C.R. 183, where discrimination on the basis of sex was characterized as discrimination on the basis of pregnancy, and therefore left outside the scope of protection. One should not lightly allow a characterization which excludes those from the scope of the Act who should legitimately be included. A narrow and exclusionary approach, in my view, is inconsistent with a broad and purposive interpretation of human rights legislation.

In this case, since the effect of the collective agreement is to deprive all same-sex couples of the bereavement benefit, sexual orientation may appear to be the ground of discrimination. However, in my opinion, though sexual orientation may appear to be an issue, the central focus is “family status”. The Tribunal found that the denial of the benefit was clearly linked to Mr. Mossop’s family situation. Mr. Mossop was denied the bereavement benefit precisely because of the “family” nature of his relationship with Mr. Poppert. Here, the employer in effect said: “We will not allow you time off to go to your partner’s father’s funeral because we do not recognize that the relationship you have with him is a family relationship. Because your situation does not fit our definition of what a family should be, we do not think it is a real family and, accordingly, you cannot enjoy this family benefit.” Not only was Mr. Mossop disentitled to bereavement leave at the death of his partner’s father, he would have been disentitled to bereavement leave even at the death of his partner.

The Tribunal, acting within its jurisdiction, identified Mr. Mossop’s claim as one of discrimination on the basis of “family status”. Based on the purpose of the Act, the purpose of the benefit, and all the evidence before it, it was perfectly reasonable for the Tribunal to conclude that the collective agreement violated s. 10(b) of the Act, a conclusion with which the Court has no reason to interfere.

...

[Cory and McLachlin JJ. each concurred with LaForest J. on the issue of the appropriate standard of review, but argued, for the reasons provided by L’Heureux-Dubé J., that the Tribunal had *correctly* interpreted “family status”.]

Note: In *Mossop* the plaintiff declined to make a *Charter* argument about the exclusion of sexual orientation from the *Canadian Human Rights Act*. The Alberta anti-discrimination legislation, *The Individual’s Rights Protection Act*, was challenged, though, in *Vriend v. Alberta*, [1998] 1 S.C.R. 493. The Court held that “The omission of sexual orientation as a protected ground in the *IRPA* creates a distinction on the basis of sexual orientation. The “silence” of the *IRPA* with

respect to discrimination on the ground of sexual orientation is not “neutral”. Gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. They, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them.”

After deciding that this violation of s. 15 could not be saved under s. 1, and considering the appropriate remedy, Iacobucci J. concluded that “reading sexual orientation into the impugned provisions of the *IRPA* is the most appropriate way of remedying this underinclusive legislation.”

The implications for human rights code interpretation in general were considered as follows:

...

105 The respondents take the position that if the appellants are successful, the result will be that human rights legislation will always have to “mirror” the *Charter* by including all of the enumerated and analogous grounds of the *Charter*. This would have the undesirable result of unduly constraining legislative choice and allowing the *Charter* to indirectly regulate private conduct, which should be left to the legislatures.

106 It is true that if the appellants’ position is accepted, the result might be that the omission of one of the enumerated or analogous grounds from key provisions in comprehensive human rights legislation would always be vulnerable to constitutional challenge. It is not necessary to deal with the question since it is simply not true that human rights legislation will be forced to “mirror” the *Charter* in all cases. By virtue of s. 52 of the *Constitution Act, 1982*, the *Charter* is part of the “supreme law of Canada”, and so, human rights legislation, like all other legislation in Canada, must conform to its requirements. However, the notion of “mirroring” is too simplistic. Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted. The determination of whether a particular exclusion complies with s. 15 of the *Charter* would not be made through the mechanical application of any “mirroring” principle, but rather, as in all other cases, by determining whether the exclusion was proven to be discriminatory in its specific context and whether the discrimination could be justified under s. 1. If a provincial legislature chooses to take legislative measures which do not include all of the enumerated and analogous grounds of the *Charter*, deference may be shown to this choice, so long as the tests for justification under s. 1, including rational connection, are satisfied.

Universally applicable labels such as “dork” and “geek” were also flung Jubran’s way. But the heart of the attack on Jubran drew on terms that come quickly to the lips of homophobes. Jubran is not a homosexual. Of overarching importance, the Tribunal proceeded on the basis that even if it accepted as a fact that the students who attacked him did not believe Jubran to be a homosexual their conduct fell within s. 8 of the *Human Rights Code*, *infra*. For my purposes therefore the case must be approached as one in which Jubran is not a homosexual and the students did not believe him to be a homosexual. ...

9 ...[T]he material findings of fact made by the Tribunal throw up a question of law that arises under s. 8 of the *Human Rights Code* and is general in nature.

...

11 ...Jubran is not a homosexual and the students who attacked him did not believe he was a homosexual. In light of the concluding words of s. 8 “...because of the...sex or sexual orientation of that person or class of persons” is not the cruel and disgusting conduct of the students in the case at bar wholly without s. 8 of the *Human Rights Code*?

12 In my respectful view the answer to that question is simply Yes. No sensible use of the English language admits of any other conclusion. And if I am wrong in treating this question as one of general law then the application of law to a particular set of facts is afoot, the standard of review is reasonableness and the result is the same for the Tribunal’s finding at step (1) (*supra*) was in turn based on an unreasonable conclusion, i.e. that s. 8 captured the conduct of the students in the case at bar. (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.)

13 The Supreme Court of Canada has ordered the Tribunal and me not to let the application of legislation such as s. 8 of the *Human Rights Code* slip the anchor of the words chosen by the legislature. (*U.B.C. v. Berg*, *supra*, at 678). The Tribunal’s decision, and the submission placed before me by Jubran’s counsel, equate discrimination through harassment by the use of hurtful words of a sexual nature with discrimination “because of the sex or sexual orientation OF THAT PERSON OR CLASS OF PERSONS”. (Emphasis added). That those two things may coincide in a given case does not mean that they do coincide in every case. And here, in the case at bar, the bottom facts as found by the Human Rights Tribunal take the case wholly outside the words of the Act.

14 In the result the Human Rights Tribunal’s conclusion at step 1 - that the School Board contravened s. 8 of the *Human Rights Code* - was based on an incorrect finding, i.e. that the students’ conduct fell within s. 8 of the Code.

15 That being so the decision of the Human Rights Tribunal is fatally flawed and must be, and is, quashed. ...

Note: In a case comment on Jubran, “Grading Human Rights in the Schoolyard: Jubran v. Board of Trustees” (2003) 36 U.B.C. Law Rev. 45, William Black argues that it would have been more in keeping with the purpose of human rights codes if homophobic harassment were prohibited regardless of the actual identity of the target or the perceptions of the harasser. He describes the purpose as follows (p. 47):

The purpose of human rights legislation is not to deal with all types of unfairness. Instead, its purpose is to protect against discrimination related to grounds such as race, sex or sexual orientation. The reason for that focus is that discrimination related to

such grounds causes harm going beyond the interests of the individuals directly affected. Discrimination on protected grounds reflects entrenched patterns of prejudice. Those patterns have detrimental consequences for society at large and it is in the public interest to provide a mechanism to eradicate such discrimination. That purpose is reflected in section 3(d) of the *Code* which provides that one purpose of the legislation is “to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this *Code*.”

While he acknowledges that a “connection does have to be shown between the conduct and a prohibited ground”, he argues that the connection need not be based on either Jubran’s self-identification as gay or on his tormentors’ perception that he is gay. Stewart J., he says, should have considered the possibility that the remarks were “based, at least in part, on the fact that [Jubran] exhibited some of the negative stereotypes about gay men.”

Barclay v. Royal Canadian Legion, Branch 12
(1997), 31 C.H.R.R. D/486 (Ont. Bd.Inq.)

Note: Ms. Barclay was a member of the Royal Canadian Legion. In September 1990, she was in the Branch 12 clubroom with a friend when she overheard a loud conversation being held at a nearby table among Legion members, including Tom Markham and Linda Paul. Both Markham and Paul were officers of the Legion. Barclay claimed she heard racist comments made about ‘niggers’ and Indians. She went over to the table with her friend and confronted the Legion members about these comments. Ms. Barclay was told to mind her own business.

Shortly after, Catherine Caithcart, the barroom steward on the evening of the incident, made a complaint against Ms. Barclay under the Legion’s by-laws because of her conduct. There followed a flurry of complaints and counter-complaints between Barclay and Markham. Ultimately Barclay’s complaints were dismissed by the Legion and those against her were upheld. Ms. Barclay was suspended from the Legion for twenty-four months less a day.

The Board of Inquiry held that Barclay had been discriminated against in the provision of a service, holding that Legion facilities were a service to its members. The significant feature of the decision for present purposes is its use of s. 12 of the OHRC to ground Barclay’s complaint even though she was neither African-Canadian nor Aboriginal.

Does Barclay have the right to claim discrimination based on association?

[73] The next issue I must address is whether the respondent discriminated against the complainant because of her association with first nations people. Section 12 of the *Code* provides:

12. A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited [ground] of discrimination.

CHAPTER 4: DEFINING DISCRIMINATION

NOTE:

The antidiscrimination provisions of the Ontario Human Rights Code effectively created a new cause of action. The last chapter explored two of the conceptual pillars on which that action is built – the prohibited grounds of discrimination, and the spheres of interaction covered by the Code. Perhaps more central to the design of a new cause of action is a substantive account of the nature of the wrong – the kind of behaviour that counts as wrongful. This aspect of the cause of action must be tailored to the interest(s) to be protected, and will therefore be linked to our reasons for selecting certain grounds for discrimination as prohibited and selecting certain spheres to be governed by anti-discrimination norms. Yet, as Judith Keene points out (*Human Rights in Ontario*, 2nd edn., Toronto: Carswell, 1992, p. 5), the Ontario Code does not define “equal treatment without discrimination”, the cornerstone concept of discrimination law. This has left it up to adjudicators – Boards of Inquiry and judges – to fashion an account of what is the interest in *equal treatment* and what makes behaviour *discriminatory* and therefore unlawful.

If a discrimination complaint were a tort, this issue would correspond to the “standard of fault” issue in tort. It may be profitable directly to compare the various standards of fault at work in tort law with the implicit understanding in discrimination law as to what makes discrimination unlawful.

Equal Treatment without Discrimination “because of”...

One possible starting point for devising an account of what discrimination is focuses on the language typical of most Human Rights Codes guaranteeing the right to equal treatment without discrimination *because of* any of a number of prohibited grounds. Many cases turn on whether the Complainant can make the factual causal link between the behaviour of the Respondent and one of the prohibited grounds of discrimination. The assumption in these cases is that discrimination has something to do with the *reasons* for the Respondent’s conduct. Ask yourself, as you read these cases

- Why do the Respondent’s reasons matter – what does this tell us about the concept of discrimination in play?
- What does the adjudicator rely on to determine what the Respondent’s reasons were?

From Intention To Adverse Effect

Early on, the fault debate in discrimination law centred around whether “intent” is required to establish discrimination, or whether it can be defined in terms of effects. This chapter begins by revisiting this debate to show it as an effort to define the wrong of discrimination, to determine what grounds the entitlement to protection and what constitutes unlawful behaviour. An important part of this

debate hinges on understanding what is meant by “intent” in this context, in contrast to an effect-based account. As you read these materials, ask yourself

- what each author (whether academic or judicial) means by “intent to discriminate”.
- What does this reveal about the implicit understanding of the human interest(s) being protected by the prohibition of discrimination?
- How would we have to understand that interest in order to make sense of the alternative – an effects-based definition of discrimination?

NOTE: The main interpretive challenge in *O'Malley* was the fact that the provision in the Ontario Code limiting the right to equal treatment without discrimination did not apply to discrimination because of religion. In other words, the list of grounds on which discrimination was prohibited was longer than the list of grounds open to an exculpatory BFR argument. In recognizing that a policy having differential adverse effects on members of a particular religion constitutes discrimination because of religion, the Supreme Court recognized that there could be circumstances in which liability should nevertheless not be imposed. It held that Respondents have a duty to accommodate the needs of those adversely affected by a discriminatory policy, but only up to the point of undue hardship. That is, the Court crafted its own exculpatory doctrine to fill the gap in the Ontario Code. In doing so, it did not use the language of BFR, the phrasing used in the exculpatory provisions of most Codes of the time.

The Ontario Code represented one standard model of drafting at the time of *O'Malley*. The *Canadian Human Rights Act* of the time illustrates a different model. The *Act* includes the usual list of prohibited grounds of discrimination. However, its exculpatory provision – drafted using BFR language, is more general than the Ontario Code's. Compare the relevant Ontario provisions as at the time of *O'Malley* with their *CHRA* counterparts:

Ontario Human Rights Code (as at 1980)	<i>Canadian Human Rights Act</i> (as at 1977)
4(1) No person shall, ... (g) discriminate against any employee with regard to any term or condition of employment, because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee.	7. It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. 10. It is a discriminatory practice for an employer or an employee organization (a) to establish or pursue a policy or practice, or ... that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.
4(6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on <i>age, sex or marital status</i> do not apply where <i>age, sex or marital status</i> is a bona fide occupational qualification and requirement for the position or employment.	14. It is not a discriminatory practice if (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a <i>bona fide</i> occupational requirement;

The language of the *Act* was more conducive to an interpretation of the concept of discrimination that includes apparently neutral policies that adversely affect those identified by reference to a prohibited ground. The Supreme Court had no trouble in *Bhinder v. C.N.*, excerpted below, in finding that the federal *Act* covers adverse effects discrimination.

That left the question of the interpretation of the *Act*'s BFR-based exculpatory provision in such a case. Note that the *Act*'s BFR clause applies to any discriminatory act or policy, no matter what the prohibited ground, and to both explicit use of a prohibited ground and facially neutral policies having a discriminatory effect. *Etobicoke* established a test for satisfying the BFR 'defence' in the case of the explicit use of a prohibited ground; how would that test be applied or adapted in an adverse effects case?

Bhinder v. CN

[1985] 2 S.C.R

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

The reasons of Dickson C.J. and Lamer J. were delivered by

1. THE CHIEF JUSTICE (*dissenting*)--...

3 In the present case, the Tribunal found the respondent, Canadian National Railway Company (CN), to be liable for discrimination against Mr. Bhinder, one of the appellants, under the *Canadian Human Rights Act*. Mr. Bhinder was required to wear a safety helmet as a condition of employment. If he complied with this requirement he would be unable to wear a turban and this would be contrary to fundamental tenets of the Sikh religion of which he is a member. The Tribunal, in coming to its conclusion, held that (1) unintentional and adverse effect discrimination are prohibited under ss. 7 and 10 of the *Canadian Human Rights Act*; and, (2) the safety helmet rule was not a *bona fide* occupational requirement under s. 14(a) of the *Act* because CN did not fulfill its duty to accommodate Mr. Bhinder's religious needs.

...

5 With respect, I am unable to agree with McIntyre J.'s decision that the Tribunal erred in law in its interpretation of the *bona fide* occupational requirement in s. 14(a) of the *Act*. I believe the Tribunal was correct in concluding the respondent employer had not established the *prima facie* discriminatory practice of requiring a Sikh to wear a safety helmet was based on a *bona fide* occupational requirement.

...

6 ... The root of the *bona fide* exception is, according to the Tribunal, "the ability of an employee to perform his or her duties", and the definition of what is a *bona fide* occupational requirement must be determined on a case by case basis according to the demands of particular jobs. A policy which discriminates against an individual on religious grounds will not, according to the Tribunal, be a *bona fide* occupational requirement unless the risks and costs incurred by the employer in accommodating the religious requirements of the individual outweigh the individual's freedom from religious discrimination. Where the practice of an employee's religious beliefs does not affect his or her ability to perform the duties of the job, nor jeopardize the safety of the public or other employees, nor cause undue hardship to the employer, either in a practical or economic sense, then a policy which restricts that practice is not a *bona fide* occupational requirement.

...

the requirement in order to hold the employment. It is, by its nature, not susceptible to individual application. The Tribunal sought to show that the requirement must be reasonable, and no objection would be taken to that, but it went on to conclude that no requirement which had the effect of discriminating on the basis of religion could be reasonable. This, in effect, was to say that the hard hat rule could not be a *bona fide* occupational requirement because it discriminated. This, in my view, is not an acceptable conclusion. A condition of employment does not lose its character as a *bona fide* occupational requirement because it may be discriminatory. Rather, if a working condition is established as a *bona fide* occupational requirement, the consequential discrimination, if any, is permitted--or, probably more accurately--is not considered under s. 14(a) as being discriminatory.

44 ...[W]here s. 14(a) applies, the subsection in the clearest and most precise terms says that where the *bona fide* occupational requirement is established, it is not a discriminatory practice. To conclude then that an otherwise established *bona fide* occupational requirement could have no application to one employee, because of the special characteristics of that employee, is not to give s. 14(a) a narrow interpretation; it is simply to ignore its plain language. To apply a *bona fide* occupational requirement to each individual with varying results, depending on individual differences, is to rob it of its character as an occupational requirement and to render meaningless the clear provisions of s. 14(a). In my view, it was error in law for the Tribunal, having found that the *bona fide* occupational requirement existed, to exempt the appellant from its scope.

...

46 I cannot, however, leave this case, without further reference to the case of *O'Malley*. On facts for all purposes identical to those at bar, Mrs. O'Malley has received protection from the religious discrimination against which she complained and Bhinder has not. The difference in the two cases results from the difference in the two statutes. The *Ontario Human Rights Code* in force in the *O'Malley* case prohibited religious discrimination but contained no *bona fide* occupational requirement for the employer. The *Canadian Human Rights Act* contains a similar prohibition, but in s. 14(a) is set out in the clearest terms the *bona fide* occupational requirement defence. As I have already said, no exercise in construction can get around the intractable words of s. 14(a) and Bhinder's appeal must accordingly fail. It follows as well from the foregoing that there cannot be any consideration in this case of the duty to accommodate referred to in *O'Malley* and contended for by the appellants. The duty to accommodate will arise in such a case as *O'Malley*, where there is adverse effect discrimination on the basis of religion and where there is no *bona fide* occupational requirement defence. The duty to accommodate is a duty imposed on the employer to take reasonable steps short of undue hardship to accommodate the religious practices of the employee when the employee has suffered or will suffer discrimination from a working rule or condition. The *bona fide* occupational requirement defence set out in s. 14(a) leaves no room for any such duty for, by its clear terms where the *bona fide* occupational requirement exists, no discriminatory practice has occurred. As framed in the *Canadian Human Rights Act*, the *bona fide* occupational requirement defence when established forecloses any duty to accommodate.

47 ...Whether a statutory change to create a similar exemption for application in the work place is desirable in Canada is not a matter for this Court, and it is my opinion that this Court may not create such an exemption judicially. I would therefore dispose of this appeal as indicated above.

NOTE: As a result of this decision there seemed to be two different exculpatory doctrines or ways of conceptualizing the limits on the right to equal treatment without discrimination, depending on whether the BFR test of *Etobicoke* was held to apply or the seemingly more flexible duty of reasonable accommodation from *O'Malley*. The differences between the two approaches spawned a wave of litigation and redrafting of statutes.

In response *inter alia* to the litigation in *O'Malley*, the Ontario legislature amended the Code in 1981 to explicitly indicate that “constructive discrimination” is prohibited. S. 10 of the 1981 Code read as follows:

- (1) A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
 - (a) the requirement, qualification or consideration is reasonable and *bona fide* in the circumstances; or
 - (b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right

The SCC decision in *Bhinder*, in deciding that no duty to accommodate arises in circumstances in which a requirement has been found to be a BFOQ, threatened substantially to reduce the scope of the intended expansion of the Code to encompass constructive discrimination. In 1986, through the passage of the Equality Rights Statute Law Amendment Act (S.O. 1986, c. 64), this problem was rectified by introducing an explicit requirement to make reasonable accommodation even in cases of constructive discrimination. The new provision, s. 11, reads as follows:

- 11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
 - (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
 - (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
- (2) The Commission, a Board of Inquiry, or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside source of funding, if any, and health and safety requirement, if any.
- (3) The Commission, a Board of Inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

The cases that follow track the Court’s attempt to determine which approach to determining the limits on the right to equal treatment without discrimination applies when, always taking account of the specific provisions of the legislation in issue.

In its factum, the appellant put the case for a finding of constructive discrimination under s. 11 in this way:

Where access to benefits in employment is at issue, adverse effect discrimination is established when benefits otherwise generally available to employees are limited or denied to certain employees on the basis of a prohibited ground of discrimination. Unequal treatment is identified by comparing the situation of the group adversely affected because of a protected ground with the group to whom the benefit is generally available.

(Emphasis added)

In my view, this submission does not describe a violation of s. 11 of the Code. Rather, the submission alleges direct discrimination under s. 5, a submission that I have already disposed of against the appellant. This does not, however, end the matter. . . . I am satisfied that even if the rule respecting employer contributions to benefit plan premiums constitutes constructive discrimination, properly understood, the justification in s. 11(1)(b) for a *bona fide* occupational qualification (BFOQ) applies.

...

Assuming that the rule respecting employer contributions to benefits plans constitutes constructive discrimination, I am satisfied that the justification in s. 11(1)(b) applies. Requiring work in exchange for compensation is a reasonable and *bona fide* requirement. There is no suggestion that the employer can do anything to accommodate the needs of this group or modify the requirement to place them in a position where they can perform the work. Further, as I have not found direction discrimination under s. 5, the rule in the collective agreement stands.

...

[Note: We will postpone an examination of Rosenberg J.'s reasoning on the BFR issue until a later chapter. For now, notice how (non)availability for work operates in each part of Rosenberg J.'s argument.]

Note: In *Ouimette v. Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19, the complainant claimed that her employer's policy of dismissing any probationary employee who was absent from work for three days during the 60 day probationary period constituted discrimination on the basis of disability. The Complainant missed three days from work and was dismissed. Two of the three days of absence were due to the flu, and the Board of Inquiry held that having the flu is not a disability within the meaning of the Ontario Code. The third day of absence, the complainant claimed, was due to having suffered an asthmatic reaction to aspirin contained in a pain remedy, which the complainant said she took not realizing that it contained aspirin (to which she knew she was allergic). The Board held that dismissal was not discriminatory because it was the complainant's own fault that she missed work because of the allergic reaction. Presumably this conclusion would have held even if all three days' absence had been related to the allergic reaction.

[52] The findings of fact resulted in the conclusion that there was no discrimination by any of the respondents on the basis of allergic reaction resulting in an asthmatic attack. . . .

[53] ... [T]here is no doubt that Ms. Ouimette, according to the testimony of her own physician, had been warned by her physician only a short time before the incident to avoid aspirin. That caution was both clear and specific. If she took aspirin, she could expect an asthmatic attack.

[54] Granted that Ms. Ouimette suffered from allergies that could manifest themselves in an asthmatic incident. As the Commission, itself, made great efforts to demonstrate, the asthma from

which Ms. Ouimette suffered was extrinsic. That is, it was caused by allergies or other factors external to her. ...

Ms. Ouimette had the power to control the ingestion of aspirin. She knew that she had to be careful; her doctor told her so. He said some responsibility had to be assumed by her as patient for her own health. Ms. Ouimette had stated that her asthma was under control at all times during her employment. For a time, that control was lost when she failed to even ask about the composition of the medicine a friend had handed her to relieve pain.

[55] Is this the kind of fact situation to which the handicap protections of the *Human Rights Code* are intended to apply? I think not. I think to press such a fact situation to complaint trivializes the broad and important principles of the *Human Rights Code*.

Bhadauria v. Toronto (City) Bd. of Education
(1990), 12 C.H.H.R. D/105 (Ont. Bd. Inq.)

Note: Mr. Bhadauria alleged that the selection practices used by the Toronto Board of Education between 1980 and 1984 had an adverse impact on him and other persons of South Asian origin. The Board relied heavily on personal interviews in choosing vice-principals. Mr. Bhadauria contended that this creates a disadvantage for person from South Asian cultures who are likely to be more deferential and less outgoing in a formal interview setting than candidates of Western European origin.

Mr. Bhadauria began teaching in 1971. He had an excellent record, and was highly thought of by colleagues and supervisors. He had experience as a department head and summer school principal. Between 1980 and 1984, he applied 39 times for a vice-principalship. He was selected for a pre-interview 4 times, but was never selected for a full interview and therefore never appointed as a vice-principal.

Introduction

[3]... [T]his case has scrutinized the promotional process adopted by the respondent Board of Education, its impact on Mr. Bhadauria, as a South Asian, and on South Asians in general. In the words of counsel for the Commission:

The issue of whether Mr. Bhadauria was the best person or not, is not the issue because that is a direct discrimination issue. The question is, was the process of selection such as to disadvantage him [Bhadauria] and other South Asians...

...

(B) JAGDISH BHADAURIA

[9] Mr. Bhadauria is a man of considerable charm, intelligence and accomplishment. He was born in New Delhi, India in 1940. He is the oldest son of a family of the Kashatara caste which he describes as "second in the pecking order" of castes in India and which represents the "ruling caste." He received undergraduate and graduate education in India achieving a Master of Science in Physics. He deliberately chose to enter the teaching profession, declining the opportunities in India for financial gain in industry and science. However, he then chose to move to England in 1964 in a quest for what he describes as "upward mobility." He successfully taught in England in a series of schools, including one which was a holding centre for "young criminals" pending their trials. He then emigrated to Canada in 1970 and began teaching with the Toronto Board of Education in

